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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHERYL LYNN LUCERO,

Defendant and Appellant.

F072676

(Super. Ct. No. CRF44425)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Han N. Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

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Cheryl Lynn Lucero was convicted of first degree murder with a firearm enhancement. She appeals the trial court's denial, during the jury selection proceeding, of several of her for-cause challenges to prospective jurors. She also challenges the trial court's admission of a number of hearsay statements made by the decedent victim. Finally, she raises claims of ineffective assistance of counsel and cumulative error. We reject all her contentions.

In light of Senate Bill No. 620, which took effect on January 1, 2018, after the sentencing in this matter, we will vacate Lucero's sentence and remand for resentencing under the amendments to applicable firearm enhancement statutes effected by this bill.

In all other respects, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

A complaint (later deemed an information) filed in the Tuolumne County Superior Court charged Lucero with the murder of Rick Roberts and alleged various firearm enhancements in connection with the murder count. (Pen. Code, §§ 187, subd. (a), 12022.5, subd. (a)(1), 12022.53, subds. (b), (c), (d).)¹ A jury found Lucero guilty of first degree murder (deliberation and premeditation) and determined that she personally and intentionally discharged a firearm, resulting in Roberts's death. (§ 12022.53, subd. (d).) Lucero was sentenced to two consecutive terms of 25 years to life for the murder and the firearm enhancement, respectively.

I. Prosecution's Case in Chief

A. Testimony of Roberts's Wife, Teddi Roberts

Teddi Roberts was Roberts's wife of over 23 years. They had a 10-year-old son, who went by Jhonathen, his middle name, which was spelled atypically.² Teddi

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

² The spelling of "Jhonathen" is relevant to the issues on appeal.

suspected that Roberts had engaged in multiple extramarital affairs over the last several years before he was killed. Consequently, their marriage was troubled but, at the time Roberts was killed, they were in the process of working out their difficulties. Roberts was killed on the morning of February 16, 2014.

Roberts was a prominent figure in the local destruction derby circuit. He would “build derby cars” in a shop he rented about a block away from his house in Sonora. His number for competition purposes was “U2.” The day he was killed, a Sunday, Roberts left the house at approximately 7:45 a.m. or 7:50 a.m. He told Teddi that he would be back around 10:30 a.m. to collect his son for the 10:45 a.m. service at Christian Heights Church. However, Roberts did not return at 10:30 a.m. as planned. Teddi testified: “I thought it was ... strange that he wasn’t there because he said he was going to come back.” Shortly after 10:30 a.m., Roberts’s mother, Donna Burkey, “barged in the front door” and told Teddi that Roberts “had been shot and he was dead.”

After Roberts’s death, the police retrieved his wallet from the body and gave it to Teddi. Teddi found a photograph of Roberts and Jhonathen in the wallet. Written on the back of the photograph was the phrase, “My husband and his son, John.” Teddi did not write those words. Teddi also noted that Jhonathen’s name was incorrectly spelled on the back of the photograph. Teddi ultimately turned the photograph over to the district attorney’s office.

Teddi had a run-in with Lucero in 2011. Teddi testified: “I was in Safeway with my son, and when we walked out, I got this feeling that somebody was staring at us. And I looked over to my left and ... she was standing there by the side of her car, and she stared at us the whole time as we walked to our car. [¶] She had a black cowboy hat on, and I think she had a white shirt on.” Teddi added that Lucero followed them virtually all the way home, “veering off” at the end.

After Teddi’s testimony, Joyce Frazier, a friend of Roberts’s, testified that Roberts had stopped by her house on the morning of his death. He arrived at Frazier’s house

around 8:35 a.m. and left “a little after 9:30 [a.m.].” Frazier heard his truck start up and leave at about 9:40 a.m.

B. Roberts’s Killing and Cause of Death

Crystal Wise testified that she lived right next door to Roberts’s shop. She was at home on the morning of February 16, 2014, the day of Roberts’s murder. Between 10:00 a.m. and 11:00 a.m. that morning, she heard two gunshots; there was a “two-second pause” between the shots. Wise’s front door and window screens were open. She immediately shut her front door and looked out from a glass window in the door. All she saw was that the door to Roberts’s shop was open and his truck was parked outside. About 40 or 45 minutes later, she saw a truck pulling a trailer parked in front of the shop.

Lawrence Thompson, Jr., testified that he and his wife arrived at Roberts’s shop on the morning of February 16, 2014, about five to 10 minutes after 11:00 a.m. They were in their black 1995 Chevy truck, which was pulling an old green truck. He went through the shop’s open door and found Roberts “laying on the ground in a pool of blood.” He noticed a “shell casing on the ground,” near the body. Thompson went back out to his wife, who called 911. The police arrived two to three minutes later. The 911 call was made at 11:13 a.m.

A forensic pathologist who later conducted the autopsy on Roberts’s body testified that he saw “one bullet wound on the left chest and another grazing wound on the left shoulder.” The bullet wound to the chest showed that the bullet went “left to right, front to back, and downward.” It was neither a “contact” nor “intermediate” gunshot wound. The bullet had penetrated the sternum, the pericardial sac containing the heart, the ascending aorta, the heart, and the thoracic vertebral bone, ultimately lodging in the “spinal cord area.” Death would have occurred in “five to ten minutes.” The bullet was recovered from the body. There was only one bullet in the body; it was “deformed because it struck the bone.” The bullet that grazed Roberts’s shoulder was not recovered from his body; it would have “kept going” after grazing him.

C. Testimony of Roberts's Nephew, Erick Burkey

Erick Burkey was Roberts's nephew and considered Roberts to be a "father figure." Since Erick was a small child, he built derby cars with Roberts, and they competed together in the destruction derby circuit throughout California, as well as in neighboring states. Two to three times a week, Erick would go with Roberts to Modesto, where they would drop off loads at a scrap yard. While in Modesto, they would get lunch at a Panda Express where Lucero worked. Roberts, as well as Erick, became acquainted with Lucero at the Panda Express. Erick could not pin down the year they met Lucero; when asked, he said: "Um, probably thinking nine – '09? I don't know. I can't remember that far."

Erick remembered an incident when Lucero gave him her phone number to give to Roberts, but Erick threw it away without telling Roberts because Roberts was married. Erick explained that Roberts and Lucero nonetheless forged a closer connection over time, with Roberts sometimes calling Lucero ahead of time to let her know they were headed to the Panda Express. Erick described the development of Roberts's relationship with Lucero: "It was just going [to Panda Express] and eating ... [a]nd then ... over time, our plates would be already made [when we got there]."

Erick described an incident that occurred in 2010. He saw Lucero at Roberts's shop in Sonora, an event he described as "weird to see." Erick testified: "She just came in. And I remember what she was wearing, too, wearing a cowboy hat and red shirt and jeans, cowboy boots, or whatever they were, and she was just looking for [Roberts]." Asked why it was "weird," Erick said: "It was just weird, just – she was in Modesto, and, you know, now she is in Sonora." Subsequently, also in 2010, Erick saw Lucero at a destruction derby in Sonora. Erick testified: "She was standing at the fence line just staring at us." She was wearing "a white cowgirl hat, red t-shirt, blue jeans, and maybe boots." Roberts told Erick, "'Hey, don't look behind you because that's ... the girl from [Panda] Express.'" Roberts did not talk to Lucero at the derby. Erick noted that it was

the middle of the day and Lucero stood there for three or four hours staring at them; she was standing about 150 feet away from them (the derby was not due to start until that evening at 5:30 p.m. or 6:00 p.m.). Erick said, “It is just odd for somebody to stare at somebody. I don’t like it.” Roberts told Erick that Lucero had been following him around and becoming a nuisance. Roberts mentioned something to the effect that he would tell the police about her. At a later point, Roberts told Erick that Lucero wanted him to help her move to Twain Harte, but Roberts was “not going to help or anything.” Roberts did not tell Erick that he had an intimate affair with Lucero.

D. Testimony of Susan Collie, Susan Hume, and Karen Small, Respectively

Susan Collie had attended Christian Heights Church in Sonora for over 10 years. Roberts attended Christian Heights as well. Collie also came to know Lucero when Lucero attended Christian Heights for a period. Some years before Roberts’s death, Collie was concerned that Lucero was engaging in an “extramarital affair” with Roberts, a married man. Collie testified: “I asked her to go to lunch and – so, I was concerned about [this] relationship with a married man and counseled her that it would be best to not be dating him until he got divorced.” Collie said Lucero responded that “[Roberts had] promised to divorce his wife and she was waiting.” Collie explained that Lucero believed “it was going to happen.”

Susan Hume testified that she first met Lucero at a Bible study at Sonora’s Heart Rock Café in 2011. Lucero dressed “all cowgirl,” including wearing a hat. Hume had attended church at Christian Heights for about eight years. Lucero attended Christian Heights for a period of about one year. Lucero and Hume became friends, and Lucero would sit at Hume’s table at church. Roberts also attended the church, but he sat at a different table with his mother. Lucero would be “kind of looking at [Roberts] a lot.” “Mostly every Sunday,” she would be “[l]ooking at him admiringly.” Sometimes Lucero would go up to Roberts to speak to him when he got up to get his son from the “children’s church.” Lucero wore, on the ring finger of her left hand, a “gorgeous” ring

that she said Roberts had given her. Hume told Lucero that the latter's conduct with Roberts "wasn't right and it wasn't ... in God's will, and that it was going to have a bad ending." Several times Lucero responded that "God had put them together." She described Roberts as "the perfect man" and she "very much so cared for him." Hume visited Lucero's apartment on "Lolly [Lane]" in Sonora one time. Lucero had put up photographs of Roberts and a painting of his car. There may have been a shrine dedicated to Roberts. Lucero also had a tattoo of a "race car, a little derby car with 'U2' on it." "It [was] the derby car that Rick Roberts drove."

Karen Small also attended Christian Heights Church. She knew Lucero from church. Lucero mentioned to Small that she attended that particular church "for a guy, some boyfriend."

E. Testimony of Roberts's Mother, Donna Burkey

Donna Burkey, Roberts's mother, lived next door to Roberts's shop. She attended church at Christian Heights. She and Roberts would sit together at a table at the church. One time, as they were sitting at the table, she saw Roberts get a look on his face as if he "had a pain or something." He spluttered and said, "That girl, Cheryl, is here." He continued: "The girl – she's kind of dressed like a rodeo queen." Donna turned and looked; the lady "had a big hat on her." Roberts looked like he was "having a heart attack." This incident probably occurred in the summer of 2013, "less than a year before he got shot." Thereafter, Donna saw Lucero several times at the church; she would usually sit at a table behind Donna and Roberts.

Donna knew of Lucero before she saw Lucero in church because Lucero had been the cause of marital strife between Roberts and Teddi. Lucero had told Roberts sometime around 2010 that Panda Express would possibly sponsor his derby car. Shortly thereafter, Lucero asked Roberts to help her move to Sonora. Roberts told Lucero: "I'm sorry, I'm not going to help you move, and don't move up there on my account because

I'm married and I have a child.'" Donna testified that Roberts "kind of backed off going to [the] Panda [Express]" at that point.

Donna also testified that Erick and Roberts had both indicated that Lucero "kind of stalked [Roberts] and watched him across the street, which made Erick and [Roberts] uncomfortable." Donna said that they had notified Sergeant Glenn Roberts of the Sonora Police Department of this issue, possibly in 2013.

Roberts did not tell Donna that he had an intimate affair with Lucero.

F. Testimony of Sonora Police Reserve Sergeant Howard Glenn Roberts, Jr.

Reserve Sergeant Howard Glenn Roberts, Jr., (no relation to Rick Roberts) was a 30-year veteran of the Sonora Police Department. Sergeant Roberts had known Roberts since the 1980s because of the latter's interest in law enforcement from an early age. Sergeant Roberts supervised the Sonora Police Department Explorer and PACT (Police Associated Citizen Team) programs. The Explorer program utilized police volunteers between the ages of 14 and 21, and the PACT program utilized volunteers over the age of 21. Roberts had volunteered in the Explorer program and thereafter was active in the PACT unit.

Sergeant Roberts had stopped by Roberts's shop in September or October 2013, roughly six months before Roberts was shot and killed. Sergeant Roberts described their conversation at the time: "We were talking—I am not sure what the conversation was about at that time, but Mr. Roberts told me that there was a girl that he met in – I think Modesto Panda Express that he felt was stalking him. On several occasions, he saw her parked up at the old E.D.D. building, which is now the Job Center or Mother Lode Internet, so he, you know, expressed that to me." Sergeant Roberts added: "I told Mr. Roberts if he felt that he was being stalked, that we need to make a report, we need to get it documented. And at that time, he refused. He said he did not want to make a report at that time." Roberts did not tell Sergeant Roberts that he had an intimate affair with Lucero.

G. Testimony of Victoria Herrick, Manager of Lolly Lane Apartments

Victoria Herrick was the property manager of Mono Village Apartments (also known as Lolly Lane Apartments) on Lolly Lane in Sonora. Herrick testified that Lucero submitted an application to rent an apartment at the complex listing Roberts as a personal reference. Lucero then rented a one-bedroom apartment at the complex; the rental agreement for the apartment was dated July 23, 2010. On November 2, 2012, Lucero submitted notice that she was moving out and thereafter moved out.

H. Testimony of Sonora Police Detective Jerry McCaig

On February 16, 2014, Detective Jerry McCaig was employed by the Sonora Police Department. He reported to the scene of Roberts's murder along with crime scene teams from the Department of Justice (DOJ). McCaig testified: "I saw a male body, Rick Roberts, lying face up in a pool of blood." McCaig noted: "There was a casing laying several feet away from his body. It was a brass-colored nine[-]millimeter Winchester casing." A bullet fragment was also found at the scene.

The DOJ conducted forensic analysis of ballistics evidence in the case. "They found that [a] bullet [recovered from Roberts's body] and [a] casing from the crime scene was likely fired from one of three firearms being a nine[-]millimeter." "The first one on the list was a Heckler and Koch, H&K; the second one was an Israeli Military Industries, also known as IMI; and the third firearm was a Kahr." Detective McCaig testified: "I contacted the firearms division of the Department of Justice and requested a list of all registered nine[-]millimeter owners in the County of Tuolumne." Lucero's name was on the list the DOJ provided in response. McCaig added: "I saw that the defendant had purchased a firearm on January 6th of 2014, and it was an H&K nine[-]millimeter." McCaig noted: "Early on in the investigation, I had heard that the defendant had an infatuation with [Roberts] a few years ago and may have been stalking him."

Through a Department of Motor Vehicles check, Detective McCaig obtained an address for Lucero on Lolly Lane. He was unable to locate her at that address. Finally,

on March 12, 2014, he located her at a Sonora McDonald's restaurant, where she worked. McCaig testified: "[A]t the time I told her that I was investigating the murder of Rick Roberts and that we were talking to everybody that knew him." Lucero agreed to meet the following day at the police department. When she came to the police department as agreed, "[s]he said she had met Rick Roberts at his church that he used to go to, she met him at a meet and greet and shook his hand and they made small talk." "She said she had never hung out with him and never been on a date with him." She also said she had not seen or talked to Roberts in three years. "She told [McCaig] that she didn't know anything was going on until she drove by his shop one day and saw a bunch of flowers, and she knew something was up from that point."

Lucero provided a Lolly Lane address for herself and said she had moved to Sonora because her children were grown, and "she was able to do what she wanted" in terms of where she lived.

Lucero acknowledged she owned an H&K firearm, specifically a P-2000 model handgun. She said she had never used the gun. Detective McCaig asked her to turn the gun over for testing. Lucero inquired: "What would ... the testing do?" McCaig testified: "I told her it would determine whether or not the bullet that killed [Roberts] came out of that gun." Lucero said, "'So if I say no, is it going to look bad against me?'" McCaig told her "that it would not clear her, by any means." Lucero said she could not hand over the gun that day but reluctantly agreed to bring it to the police department the next day. Lucero did not bring the gun to the police department the next day. On March 18, 2014, McCaig and Sergeant William Killian went back to the McDonald's where Lucero worked. They emphasized to her the significance of testing her gun. Lucero said she would hand the gun over as soon as possible. However, Lucero never provided the gun to the police.

On June 18, 2014, the property manager at the Lolly Lane address provided to the police by Lucero, told Detective McCaig that Lucero had moved out of the complex in

2012. Thereafter McCaig, along with Tuolumne County Sheriff's Sergeant Greg Rogers, returned to the McDonald's where Lucero worked. This time Lucero told them that she had given her gun to her son who lived in Los Angeles. When the detectives asked her to come for questioning to the police department, Lucero said she had plans but agreed to come the following day. Lucero again provided a residential address on Lolly Lane, but when confronted by detectives with the information provided by the property manager of the Lolly Lane apartment complex, Lucero admitted "she lied because she didn't want anybody to know where she lived." Lucero gave the detectives a home address on August Court in Twain Harte.

Later the same day, June 18, 2014, the detectives decided to go to Lucero's residence rather than wait for her to come to the police department the next day. Lucero was home; she did not want to talk to Detective McCaig but agreed to talk to Sergeant Rogers. Rogers went in and searched her room. McCaig and Rogers also learned that Lucero had a storage unit in Soulsbyville. McCaig searched the storage unit. He found a framed picture of Roberts's derby car in the storage unit. Behind that picture was a picture of Roberts that was inscribed, "My bad boy."

Roberts's cell phone was retrieved from the crime scene. There was no record of any text messages or phone calls between Roberts and Lucero in the phone; no phone number for Lucero was saved in the phone. The records in the phone went "one year back." Relevant records obtained from the phone company also showed no contacts between Roberts and Lucero going back one year.

I. Testimony of Alexis Dutra, Firearms Department, Bass Pro Shop

Alexis Dutra (Dutra) was the "gun vault fire specialist" at the Bass Pro Shop in Manteca. Dutra testified that Lucero bought an H&K P-2000 nine-millimeter gun from the Bass Pro Shop. Dutra noted that all new H&K firearms come with one "test fire casing" (Glock is the only gun manufacturer that provides two test fire casings). She explained that "[a] test fire casing is when the manufacturer has shot rounds through the

firearm to make sure that it works and they send a casing inside of an envelope ... with the firearm in the box.” Dutra further testified that H&K P-2000 nine-millimeter guns come with two magazines.

Dutra was asked about the documentation that was filled out when Lucero bought her gun. Dutra testified: “The date she came in and originally did her paperwork was 1-6 of 2014, and the day she picked it up was 1-17 of 2014.” Dutra testified that any customer who purchases a gun from the Bass Pro Shop has to wait 11 days after purchase to pick up the gun, as a result of “waiting period” laws. Dutra said that Lucero’s gun application stated, under penalty of perjury, that her residential address was 14531 Lolly Lane in Sonora. On the application, Lucero also stated that she did not unlawfully use controlled substances.

J. Testimony of Tuolumne County Sheriff’s Sergeant Gregory Rogers

Sergeant Gregory Rogers was assigned to assist the Sonora Police Department with the investigation of Roberts’s murder. On June 18, 2014, Rogers went with Detective McCaig to Lucero’s residence on August Court in Twain Harte, where she lived with Joe and Yvonne Yniguez. Lucero agreed to let Rogers search her bedroom but not McCaig.

Sergeant Rogers testified: “Well, about a third of the way through the search, I was going through a dresser inside of the room. In one of the drawers, when I opened it up, it had clothes in it. As I moved the clothes, I saw two live rounds of ammunition roll across the drawer. And having familiarized myself with the case previously, I knew that in one of the D.O.J. reports, that the bullet used was a Winchester nine[-]millimeter silver tip bullet. And what I saw roll across the drawer was a nine[-]millimeter and it was silver tipped, and there was two of them rolling.” Rogers added: “[A]nd as I pulled back the clothing, there was a very small envelope on the edge of the side of the drawer that I hadn’t seen before, and as I moved the clothes, it fell flat. When I looked at it, I saw that it had the make, model, and serial number of a weapon, and I immediately recognized

that as the envelope that contains a test fire casing that comes with the weapon when you purchase a weapon.” Rogers did not open the envelope but could feel a casing (or casings) inside it. Rogers asked Lucero whether he could take the items he had found for comparison tests. Lucero reluctantly agreed after being told the police could obtain a search warrant from a judge. Regarding the “spent casings” in the test fire envelope, Lucero noted that “those were sentimental to her.”

The two bullets Sergeant Rogers had found in the dresser were later determined to be “Winchester nine[-]millimeter Luger silver tip bullets.” They were hollow point bullets. Hollow point bullets cause significant damage because, upon impact, their jackets peel off, and they “blossom out like a flower” with “miniature little blades, scalpel[s], knives ... for cutting.” With reference to the envelope he found in the dresser, Rogers explained: “It says Heckler and Koch – which is an H&K – nine[-]millimeter pistol, and it gives the model number of P2000-V3 sub comp, short for sub compact.” The envelope contained two casings (the People’s ballistics expert later indicated that one was the test fire casing from the manufacturer). As for the other casing, Rogers noted it was a “Winchester nine[-]millimeter Luger” that matched the casing found at the crime scene. Rogers explained that sometimes a bullet’s casing gets jammed in the gun and fails to fully eject upon firing of the bullet; the jammed casing can later be retrieved from the gun. The most common manifestation of this phenomenon is “[referred] to as a stovepipe.” Rogers did not find Lucero’s gun during the search of her room.

Lucero agreed to go with Detective McCaig and Sergeant Rogers to the police station at that time for questioning. Rogers interrogated Lucero at the police station for four and a half hours. A video recording of the interrogation was played for the jury.³

³ The details of Lucero’s police interrogation are addressed below.

K. Testimony of Ronald Welsh, DOJ Senior Criminalist

DOJ Senior Criminalist Ronald Welsh (Welsh) testified that he was dispatched to Roberts's shop on February 16, 2014, to process the crime scene. Welsh noted: "It was apparent the victim had been shot at least two times. We were also told at the scene that there were witnesses that heard two shots, but there was only one cartridge case." Welsh testified that the second cartridge case was never located at the scene.

Subsequently, DOJ was provided with the bullet recovered from Roberts's body, for analysis. That bullet was a hollow point "Winchester silver tip nine[-]millimeter Lugar bullet." Welsh analyzed the rifling on the bullet; he also analyzed the shell casing that was found at the crime scene. Welsh testified: "From the bullet and the cartridge case, I was able to eliminate most of the manufacturers [of] nine[-]millimeter firearms." He limited the manufacturer of the weapon that fired the bullet and expelled the shell casing to one of three: Heckler & Koch, Israeli Military Industries, and Kahr.

In June 2014, Detective McCaig sent Welsh a test fire envelope containing two cartridge casings. One of the casings was from a German manufacturer and was "not a commonly-available ammunition on the commercial market in the United States." The other casing was "marketed by Winchester" and was similar in brand and type to the casing found at the crime scene. Welsh then conducted a microscopic comparison of the casing from the crime scene and the two casings in the test fire envelope. He described his analysis: "I looked at breech face marks and fire pin drag. And not just at the characteristics like I had done previously, but I was actually looking at very fine microscopic marks within those marks that are unique. They're just random marks that are produced as a function of manufacturing." Welsh added: "Based on corresponding and microscopic marks between all three cartridge cases, I was able to determine they were all fired from the same firearm." Welsh noted that this conclusion was "as certain as we can be," in other words, "100 percent" certain.

L. Testimony of Tuolumne County Sheriff's Detective Brandon Lowry

On June 19, 2014, Detective Brandon Lowry of the Tuolumne County Sheriff's Office executed a search warrant for Lucero's bedroom in the house of Joe and Yvonne Yniguez on August Court in Twain Harte. The search team located Lucero's wallet in her room. A soft, black gun case "designed to hold a pistol, a handgun" was also found in the room; the gun case was empty except for an owner's manual for an H&K pistol. A nine-millimeter magazine for an H&K gun was found in the room as well. The search team further found four envelopes that were displayed on the window sill in the room. Three of the envelopes contained letters. One letter was addressed to Lucero's daughter, Laura Lucero of Los Angeles and was dated January 18, 2014; another was addressed to Lucero's mother, Linda Lucero of Reno, Nevada, and was also dated January 18, 2014; and the third was addressed, "Thank you, Yvonne." The final envelope was addressed, "The Last Will and Testament of Cheryl L. Lucero" and contained a document dated January 18, 2014. Lowry read the will and the letters out loud to the jury.

The will specified Lucero's wishes regarding the distribution of her assets. In the letter to her daughter, Lucero wrote: "I let people control my life that should've never had the control I gave them." She added: "I was blinded by my love for this person and it is my own fault for what has come." She concluded: "I believe it is time for me to go now." In the letter to her mother, Lucero wrote: "Mom – I have no words to express apology big enough to erase all the unnecessary hurt and pain that I have caused you through the years and now recently. I let someone in my life who I let have complete control of me in every aspect. I loved him unconditionally, but it wasn't enough. Things have gone negatively severely. I am stuck between a rock and a hard place. I don't want to leave, but staying is too hard to bear at times. My love holds me to him, regardless."

Detective Lowry also executed a search warrant at Lucero's storage unit in Soulsbyville. At the storage unit, the search team found a handwritten "wedding announcement" regarding the wedding of Rick Roberts and Cheryl Lucero. The

announcement stated: “Rick Roberts and Cheryl Lucero request the honor of your presence at their union in marriage on this day of our Lord, Tuesday, November twenty-third, two thousand ten, one p.m., Sonora, California, R.S.V.P. 559-1281.” A framed photograph of a derby car and driving directions to a destruction derby were also found in the storage unit.

M. Testimony of Lucero’s Son, Jeremy Bishop

Jeremy Bishop testified that Lucero had two children, him and his sister. On February 16, 2014, Bishop lived in Alabama; thereafter, he moved to Florida. He had never lived in Los Angeles. Bishop had not seen Lucero since 2012 or 2013. Lucero did not give him any gun at any time. She did not give him an H&K nine-millimeter pistol in 2014. Bishop did not travel to California in June 2014. Indeed, Bishop’s son was born in June 2014 in Pensacola, Florida, and he was present at his son’s birth. Bishop received a strange voicemail from his mother in early 2014 directing him not to answer phone calls from unknown numbers.

N. Testimony of Laura Brady, Manager of McDonald’s (where Lucero Worked)

Laura Brady was the general manager of a McDonald’s in Sonora. With reference to timecard records, Brady testified that on February 16, 2014, Lucero “clocked in for work at 5:00 a.m.” and clocked out at 10:00 a.m.

O. Lucero’s Police Interrogation

Sergeant Rogers interrogated Lucero at the Tuolumne County Sheriff’s Department from 5:22 p.m. to 11:45 p.m. on June 16, 2018. Lucero said she had bought her H&K nine-millimeter pistol for “plinking” (shooting at rocks and cans). The \$1,200 gun was a present from Joe and Yvonne Yniguez. Although she previously told Detective McCaig she had never shot her gun, she told Rogers during her interrogation: “I’ve only shot [the gun] once. I’ve only gone plinking once.”

Lucero said she had lied about how she met Roberts, the extent of her relationship with him, and her home address, out of fear. Lucero had just wanted to be friends but Roberts, upsettingly, did not want even that. However, he had once sexually assaulted her.

Lucero said that on February 16, 2014, the day Roberts was murdered, she left work and went straight home; the drive took “about twenty minutes.” Sergeant Rogers suggested that Lucero had the opportunity to commit the murder because Roberts was “killed somewhere between ten and eleven” and Lucero “got off work at ten” that morning. Lucero denied killing Roberts. Earlier in the interrogation Lucero said that when she got home from work, Joe Yniguez was not home. Later in the interrogation, she said Joe Yniguez was there as she had talked to him when she got home.

At one point during the interrogation, Sergeant Rogers noted: “We have you purchasing a gun a month before [Roberts] was killed, we have you getting off work within just a few minutes of him being killed, we have you in possession of ammo that matches the crime scene, and a weapon that matches the crime scene. You’ve seen the cop shows, you know how it works. There’s a reason we’re here talking to you.” Lucero responded: “Mmm Hmm.” Later, Rogers said: “Did you give your gun to somebody else, they did it? Did you actually tell somebody else about what happened and they took care of it? Is that what happened?” Lucero responded: “No.” She added: “My gun was at home ... [¶] ... I went home and it was right where it has always been kept.” Lucero indicated she subsequently gave her gun to her son, so he could go plinking with his friends.

Eventually, after consistent denials, Lucero told Sergeant Rogers she had accidentally shot Roberts. Lucero said she had bought the gun to go plinking but “[t]hen I thought, maybe I can use this to intimidate [Roberts].” Lucero said that on February 16, 2014, she drove over to Roberts’s shop after work; it was a 30-minute drive. She was still in her McDonald’s uniform. She had not expected Roberts to be there because on

Sunday mornings he was usually at church. As she was driving by, she saw Roberts standing outside his shop and pulled up. Roberts had been harassing her, and she could not take it any longer. Inside the shop, she told Roberts that she never wanted to see him again in her life. She pointed the gun at him, and it suddenly went off. A bullet struck Roberts in the chest, and he fell to the ground. Lucero felt the gun jam. She could not say whether she had fired two shots as it “sounded [like] one big bang.” It all happened in “the blink of an eye.” Lucero said: “That’s not what was intended. I just wanted to scare him.”

Lucero said she drove home immediately after the shooting. When she got home, she noticed a shell casing was stuck in the gun, “[o]n the topside”; “it was pinned in.” Lucero removed the casing and likely put it in the test fire envelope that came with her gun, but since it was a long time ago, she could not say for sure. Lucero did not want to give her gun to Detective McCaig because she knew the gun was used to kill Roberts. Lucero did not tell Joe Yniguez “anything” about the shooting. Indeed, neither Joe Yniguez, nor anyone else, knew anything about it.

To conclude, Sergeant Rogers asked Lucero: “[I]s there anything you can tell me you think I need to know? That maybe a question I haven’t asked you yet or something that we need to know about this?” Lucero responded: “[Roberts] told me he was with a cadet.” She continued: “[He said that as a result of that relationship,] he had a complaint filed against him for harassment [at his work as a police department volunteer].” Shortly thereafter, Lucero said: “[D]o you know if I’ll be getting to go home? I mean, in the near future whatever? Cause I’ve been up since five o’clock this morning.” Rogers responded: “Well, based on what you’ve told me ... you’re gonna be arrested for [Roberts’s] murder.”

At that point, Lucero suddenly changed her story. She said she had not been able to tell the truth because she was trying to protect someone. She said, “I wasn’t there when [Roberts] actually was killed.” Rather, Christopher Tinkham, her ex-boyfriend

(they had lived together for 10 years), shot and killed Roberts. Lucero explained she had met up with Tinkham at her work, and they drove together to Roberts's shop. When Lucero saw Roberts standing outside his shop, she pointed him out to Tinkham as "the guy who's been giving me trouble." Lucero gave Tinkham her gun and told him to "just scare" Roberts. She added that Tinkham went inside the shop, the gun "went off," and "the next thing he knew [Roberts] was on the ground." Lucero heard "a loud bang" as she waited outside in the car. Lucero dropped Tinkham off at her work and went home. She put her gun back in its case; she also put a spent casing that was jammed in the gun into the test fire envelope. When Detective McCaig later asked for her gun, she contacted Tinkham, who got rid of the gun for her.

Lucero then got up to leave the interrogation room, but Sergeant Rogers informed her she was under arrest and not free to leave. She responded: "Even though I wasn't the one who [actually shot Roberts]?" She added: "I don't know the circumstances. I wasn't in the building." Rogers again told her she was under arrest in connection with the shooting.

P. Christopher Tinkham

Sergeant Rogers questioned Christopher Tinkham the day after Lucero was arrested. Tinkham was shocked and denied any involvement in the shooting. Tinkham's employer at a Modesto shoe store testified at trial; he confirmed that Tinkham was working at the shoe store at the time of the shooting. Tinkham also testified at trial. He denied involvement in the shooting. He explained he had a nine-year relationship with Lucero that ended because of infidelity on her part. He described her as obsessive.

II. Defense Case

A. Lucero's Testimony

Lucero testified on her own behalf. She met Roberts in early 2010, when he would come to eat "two to three times a week" at Panda Express in Modesto, where she was a manager. Roberts told Lucero he was separated. Lucero and Roberts flirted and

exchanged numbers and eventually, beginning the same year, had a romantic and sexual relationship for about a year. Lucero saw Roberts compete in multiple destruction derby competitions throughout Northern California, at his invitation. In the fall of 2010, shortly after she moved from Modesto to Sonora, Lucero got a tattoo of one of Roberts's derby cars with the U2 symbol, on her hip.⁴ Roberts also invited Lucero to attend his church, Christian Heights, which Lucero attended every Sunday during the course of their relationship. Roberts visited Lucero's apartment on Lolly Lane; Lucero had put up photographs of Roberts in the apartment. Lucero considered Roberts to be "perfect."

Roberts eventually broke up with Lucero in the spring of 2012. Lucero accepted his decision and did not attempt to see him thereafter. In November 2012, a few months after Roberts broke up with Lucero, Lucero moved to Twain Harte to live with Joe Yniguez. She was in a romantic and sexual relationship with Joe at the time. Lucero moved into the house that Joe shared with his wife, Yvonne. Lucero testified: "I was very hush hush [around Yvonne], so to speak, as far as what was going on between Joe and myself, and I was also told [by Joe] not to wear any makeup." Joe would buy marijuana in "bulk quantity," and Lucero would smoke it with him. Lucero continued to work at the McDonald's that she had started working at shortly after moving to Sonora.

Soon after Lucero moved in, Joe's personality changed and he "would get in very angry moods." Instead of his previous "happy go lucky" persona, Joe became controlling and possessive, even surveilling Lucero at work. He would repeatedly accuse her, falsely, of cheating on him and "constant[ly] belittle" her. Joe drove by Roberts's shop with Lucero; he would accuse her of cheating on him with Roberts. On one occasion, possibly in the summer of 2013, Joe "[threw] accusations" at Lucero and then had "sex with [her] against [her] will." Joe also had a "good side." His wife, Yvonne, was a very

⁴ Lucero's rental agreement with the Lolly Lane apartment complex in Sonora was dated July 23, 2010, indicating she moved to Sonora that summer.

good person. Despite Joe's controlling behavior, Lucero did not move out of Joe's house because of "financial" constraints and because she was "trying to be understanding." In the spring of 2014, Yvonne found Joe and Lucero in the shower together and was very upset. However, she permitted Lucero to continue to live at the house.

Earlier, Joe drove Lucero to the Bass Pro Shop and bought her the H&K pistol (he gave her a gift card to do so, in view of legal requirements for gun purchases). Lucero "thought that the money could have been much more well spent on a lot of other things." However, she could not voice her concerns because of Joe's angry nature. Lucero had subscribed to *Guns & Ammo* magazine from before the time she met Joe. She also enjoyed plinking. Owning a gun was not "a priority" for her, but she wanted to buy a gun "[s]omewhere down the line," when she "could afford it." She acknowledged she falsely put down her old Lolly Lane address on the paperwork for the gun, under penalty of perjury. She also falsely certified that she did not smoke marijuana.

Lucero picked the gun up at the Bass Pro Shop on January 17, 2014; the next day, January 18, 2014, she wrote the letters subsequently found on her windowsill. In the letters to her mother and daughter, she said it was time for her to go be with the Lord; she also wrote out a last will and testament. Around the same time, specifically on January 16, 2014, Lucero was demoted from her management position at McDonald's.

After Lucero picked up her gun from the store, Joe put it in a gun safe explaining it would be safe there. Lucero did not know the combination to the gun safe. Then, at the end of January/beginning of February, she made Joe take the gun out of the gun safe, so she would have access to it. Joe insisted the gun should remain in the gun safe, where his guns were kept too, but Lucero demanded it be taken out. The gun was placed on her dresser, so she could have access to it at any time.

At some point, the gun went missing, but Lucero was too scared to discuss the disappearance with Joe, as she anticipated he would harshly reprimand her for losing it. She said she did not tell the police the gun had gone missing from her dresser as she was

afraid the information would get back to Joe. Given her fear of a reprimand from Joe, she told the police her son had the gun. Regarding the letters found on her windowsill, Lucero testified they were written for the eventuality “that things went south, so to speak, as far as Joe and the frame of mind that he was in.” However, in the letter Lucero wrote to Yvonne she indicated she had “found a peace [at the Yniguez home] that [she had] found living nowhere else.” Lucero’s relationship with Joe ended on June 18, 2014, the day of her arrest. She acknowledged, however, that she had called Joe and Yvonne after her arrest in this matter and asked them to bail her out, but they said they could not afford to do so. Lucero acknowledged she had told Joe in the call that he was her strength and that he and Yvonne had been wonderful to her.

Lucero acknowledged she falsely told the police that Christopher Tinkham had the gun. Lucero also falsely told the police that Roberts had sexually assaulted her when in fact the incident at issue was “consensual.” In addition, she falsely told the police that Roberts had never been to her apartment; in truth he had not only visited her apartment, he had a key to it. Lucero explained why she gave false information to the police: “I felt that [the officer] didn’t want to hear my plain explanation, that he wanted more, and so I just started fabricating things one after another.” Lucero also said she confessed to killing Roberts because she was exhausted. As for why she gave the police her old Lolly Lane address, Lucero said she was concerned about protecting the privacy of Joe and Yvonne.

The prosecutor questioned Lucero about the tattoo of Roberts’s U2 derby car on Lucero’s hip. Lucero acknowledged she had that tattoo covered up by a tattoo of a “koi fish.” A note found in Lucero’s wallet indicated that on February 20 (the year at issue was unclear), she had obtained from a tattoo shop an estimate for the cost of covering up the derby car tattoo. The prosecutor insinuated that the February 20 date on the note indicated that Lucero had sought to cover up the tattoo shortly after Roberts’s February 16, 2014 murder. Lucero insisted that the note was from February 20, 2013, well over a

year before it was found in her wallet on the date of her arrest (June 18, 2014). Lucero said she had the derby car tattoo covered with the koi fish tattoo at the same Washington Street tattoo shop where she received the derby car tattoo. Thereafter, she made inquiries about covering up other tattoos.

Lucero also acknowledged that she wrote, "My husband, Rick, and his son, John," on the back of the photograph of Roberts and his son that was found in his wallet. The prosecutor and Lucero then had the following exchange:

"Q. Okay. And Rick Roberts was never your husband. In fact, he was married to another woman, correct?

"A. Yes, ma'am.

"Q. Why would you write something like that?

"A. Because he was my boyfriend at the time?

"Q. Well, he was your boyfriend that didn't want you sitting by him at church, correct?

"A. Yes, ma'am.

"Q. Your boyfriend that didn't want any physical contact with you in public, correct?

"A. Yes, ma'am.

"Q. Your boyfriend that was married to another woman?

"A. Yes, ma'am.

"Q. And your boyfriend that never proposed to you?

"A. Yes, ma'am.

"Q. So[,] to write on the back of a photograph[,] 'My husband, Rick, and his son, John,' you were obsessed with Rick Roberts, correct?

"A. No ma'am.

[¶]...[¶]

“Q. [Well] [y]ou tattooed Rick Roberts’[s] destruction derby car onto your groin, correct?

“A. Yes, ma’am.

“Q. You wrote on the back of a photograph, “My husband, Rick, and his son, John” even though he never was your husband, correct?

“A. Yes, ma’am.

“Q. And you hand made a wedding announcement announcing the marriage of Rick Roberts and Cheryl Lucero, which was a fabrication of your own mind, correct? Never happened?

“A. Yes, ma’am.

“Q. You were obsessed with Rick Roberts?

“A. No, ma’am.

B. Testimony of Dr. Richard Leo, Defense Expert on False Confessions

Richard Leo, a professor of law and psychology at the University of San Francisco, testified as an expert witness on false confessions. Leo explained that the “goal of police interrogation is to get an incriminating statement, ideally a narrative confession from a criminal suspect whom the police officers believe is guilty in order to build a case against them.” “[T]he assumption is people aren’t going to [confess] unless you put pressure on them and use [specialized] psychological accusatory techniques.” The interrogation process is “designed for guilty people” and interrogations are “fundamentally accusatory.” Therefore, “when innocent people are mistakenly interrogated, sometimes they will make or agree to false confessions.” “There are a number of techniques and a number of personality traits that increase the risk of why somebody would falsely confess, and the explanations are typically based both on the person’s individual make up as well as the techniques that are used during interrogation.” When an interrogation is prolonged, it “usually makes people feel desperate, hopeless, wanting to escape, for them, what is a high-pressure environment.” Most false confessions are the product of “longer interrogations.” “Although [interrogations are] not

designed to psychologically coerce” people, “that’s the effect nonetheless.” Leo testified that hundreds of cases of false confessions have been documented and the law enforcement community is cognizant of, and acknowledges, the phenomenon of false confessions. However, false confessions remain the exception.

III. Prosecution’s Rebuttal Case

A. Testimony of Eric Guin, Owner of Tattoo Shop in Sonora

Eric Guin owned a tattoo shop on South Washington Street in Sonora. Towards “the middle of 2014” (Guin did not remember the timeframe with certainty), a woman who had a tattoo of a “red derby car” with a “U2” symbol came to his shop for a consultation. The derby car tattoo was previously “done in [Guin’s] shop.” The woman had come either to “have the tattoo touched up” or “inquire about another tattoo.” However, when Guin was shown a photograph of Lucero’s koi fish tattoo, he testified that it was neither his work nor the work of anyone in his shop.

B. Testimony of Yvonne Yniguez

Yvonne Yniguez testified that “sometime in November 2012,” Lucero moved into the home Yvonne shared with her husband, Joe. Lucero lived there until she was arrested on June 18, 2014. Joe and Yvonne gave Lucero a gift certificate to buy a gun; Yvonne was under the impression Lucero wanted a gun to go target shooting. Lucero bought the gun in January 2014.

Joe and Yvonne had a gun safe; they were the only people who knew the combination to the gun safe. Yvonne recalled an argument between Joe and Lucero. Joe wanted Lucero to keep her gun in the safe, but Lucero was “insistent on obtaining the gun” and keeping it elsewhere. On February 16, 2014, the day of Roberts’s murder, Lucero returned home from work about 11:00 a.m. Joe had been home with Yvonne all morning. When Yvonne read in the local paper that Roberts had been killed, she mentioned it to Lucero; Lucero did not react or even turn around to face Yvonne.

Yvonne found out about the affair between Joe and Lucero on April 30, 2014, when she came home unexpectedly and “caught them in the shower.” Yvonne testified: “I wanted her to leave, of course. And then I thought about it, and I knew she’d have to have time to find a place, and so I just let it go.” Yvonne’s anger was directed at Joe, not Lucero. Yvonne found it odd, however, when a few days before Lucero was arrested, she came to Yvonne and said: “Yvonne, no matter what happens ... I want to thank you for everything you’ve done for me.” Yvonne found it odd because “it was very sincere,” but it came “out of nowhere.”

DISCUSSION

I. Trial Court’s Denial of Lucero’s Challenges for Cause

Lucero argues that, during jury selection, the trial court improperly denied her challenges to three prospective jurors for cause (Prospective Juror Nos. 344526, 348834, and 350328), and, furthermore, improperly restricted voir dire of one of these prospective jurors, Prospective Juror No. 348834. Lucero also argues: “To the extent this issue was not properly preserved for appeal, defense counsel was ineffective for failing to state explicitly his dissatisfaction with the seated jury and was further ineffective for failing to identify any of [the seated] jurors who were biased or legally incompetent.” She contends the judgment must therefore be reversed.

Preliminarily, we note that Lucero has forfeited for purposes of appeal, the issues of the trial court’s denial of her for-cause challenges to these prospective jurors as well as the court’s restricting of voir dire of one of them, because defense counsel did not express dissatisfaction with the jury that was ultimately seated. (See *People v. Weaver* (2001) 26 Cal.4th 876, 910-911 (*Weaver*).) Even assuming the issue was not forfeited, Lucero has failed to show prejudice as she has not demonstrated, based on the record, that an incompetent juror—i.e., a juror who was removable for cause—actually remained on the jury that decided the case. (*People v. Black* (2014) 58 Cal.4th 912, 917 (*Black*).)

Accordingly, her alternative argument that counsel was ineffective for failing to express dissatisfaction with the jury and identifying any incompetent juror(s) also fails.

A. Background

During jury selection, the defense challenged three prospective jurors for cause, namely Prospective Juror No. 348834 (Juror 348), Prospective Juror No. 350328 (Juror 350), and Prospective Juror No. 344526 (Juror 344).

B. Juror 348

Juror 348 had known lead prosecutor Laura Krieg for 40 years, practically since she was “born,” but presently did not see her “too often.” Not only had their parents been “very good friends” the entire time, but Juror 348 had also dated Prosecutor Krieg approximately 11 years ago. Juror 348 did not disclose his prior dating relationship with the prosecutor; it was the prosecutor who brought that fact to defense counsel’s attention, explaining that she and Juror 348 had gone to “dinner maybe three or four times.” Although defense counsel sought to inquire further into the extent of the romantic relationship between Juror 348 and the prosecutor, the court ruled that counsel could only ask Juror 348 whether the relationship was “casual or serious,” not any “intimate details” regarding the relationship. Juror 348 characterized his prior romantic relationship with the prosecutor as “casual/serious” and “off and on,” adding that it lasted “a month” or “couple of months.” Juror 348 said that he was “positive” his relationship with the prosecutor would not affect his ability to be fair. Defense counsel challenged Juror 348 for cause. The court denied the challenge, whereupon the defense exercised a peremptory challenge to excuse this prospective juror.

C. Juror 350

As to Juror 350, the court stated it had known Juror 350’s mother, who worked at the superior court, for a long time. Juror 350 herself was a volunteer in the Tuolumne County District Attorney’s Office (which was prosecuting the instant matter); she volunteered about four hours a week there. In the course of her volunteer work, Juror

350 had some contact with Laura Krieg, the lead prosecutor in the instant case. Furthermore, Juror 350 had put in some work on the instant case and had “some knowledge” of it. In fact, Juror 350 was due to attend the instant trial with the victim/witness representative from the district attorney’s office. In addition to her connection to the district attorney’s office, Juror 350 also knew Roberts and “hung out” at the latter’s shop with other friends. However, Juror 350 indicated she “would listen and be fair and hear what [Lucero] has to say.” The defense challenged Juror 350 for cause. The court denied the challenge, whereupon the defense exercised a peremptory challenge to remove this juror.

D. Juror 344

Juror 344 said she had numerous personal acquaintances and family members who worked in law enforcement. Although she would “listen” and be “reasonable,” she would be “somewhat bias[ed] to those [she] already [knew] – whose character [she] [knew].” Juror 344 also revealed she was a “close friend” and business partner of Susan Collie, one of the prosecution witnesses. Regarding Susan Collie, Juror 344 stated: “I’m investing money with her, so obviously I have a great level of trust for her and I know her well.” When asked by defense counsel whether she would be more inclined to believe Susan Collie over the defendant, Juror 344 answered in the affirmative, explaining: “I would listen and weigh the facts, but if it came down to just two stories and I had to make a choice, I don’t know Miss Lucero. I do know Miss Collie, and I know her well.” When asked by the prosecutor whether she could be “fair and impartial to both the defendant and Miss Collie and basically judge the evidence and the credibility of both witnesses equally,” Juror 344 responded: “Yes, uh-huh. I would.” The defense challenged Juror 344 for cause. The court further questioned the juror about her ability to be fair. The juror responded that it was difficult to “talk in abstracts” but she “would do [her] best to listen to the big picture” before making any choices. She added: “My relationship is a factor, but yes, I would consider all factors. Yes, sir.” The court denied

the defense challenge for cause. The defense then used its 20th and last peremptory challenge to excuse Juror 344.

E. Defense Request for Additional Peremptory Challenges

As noted above, the defense exhausted its peremptory challenges, having exercised three of its allotted 20 peremptories to excuse Jurors 348, 350, and 344. Prior to exhausting her peremptories, Lucero requested two additional peremptory challenges. Counsel and the court had the following exchange in this regard:

“[DEFENSE COUNSEL]: Okay. And the issue I have, I used one challenge for [Juror 350] for cause. And I’m going to ... use my peremptory on [Juror 344]. That was one of the last causes denied, so I would ask the Court for two extra peremptories.”

“THE COURT: Why?”

“[DEFENSE COUNSEL]: Well, because I had to use two peremptories on people that I thought were for cause, and I think that it would be fair to Miss Lucero.

“THE COURT: I don’t think the law allows me to give you any more than the statute provides for, [counsel]. There is 20 a side in a case like this. [¶] Do you have some authority for that position the Court has discretion –

“[DEFENSE COUNSEL]: I do not have any with me. I know the case law says if I do not ask for extra ones, then the issue is waived for appeal, so there must be some ...

“[THE PROSECUTOR]: Your Honor, for cause challenges were denied. Therefore, there is no basis for asking for additional peremptories.

“THE COURT: Well, I don’t think I would grant it for that reason, that I denied a cause challenge and you had to exercise a peremptory. That is just part of the process. But if there is some other reason that you believe I should grant you additional challenges and there is authority for that, I would be willing to listen to that.

“[DEFENSE COUNSEL]: I would submit it.

“THE COURT: All right. [¶] Then I’m going to deny your request for additional [peremptories].”

F. Applicable Law

Challenges for cause are constitutionally guaranteed under the Sixth Amendment to the federal Constitution as well as under our state Constitution, both of which confer the rights to a fair trial and an impartial jury. (*Black, supra*, 58 Cal.4th at p. 916.) “In California, criminal defendants are allowed an unlimited number of challenges to prospective jurors for cause, which the defendants must use before exercising any peremptory challenges.” (*Ibid*; Code Civ. Proc., § 226.) Challenges for cause may be based on “[g]eneral disqualification,” “[i]mplied bias,” or “[a]ctual bias.” (*Black, supra*, at p. 916; see Code Civ. Proc., § 225, subd. (b)(1).) Lucero suggests that the three jurors at issue should have been excused for implied bias or actual bias. Implied bias occurs when there is “[t]he existence of a state of mind in the juror evincing enmity against, or bias towards, either party.” (Code Civ. Proc., § 229, subd. (f).) Actual bias is defined as the “state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” (Code Civ. Proc., § 225, subd. (b)(1)(C).) “In general, the qualification of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal.” (*People v. Kaurish* (1990) 52 Cal.3d 648, 675; *People v. Farnam* (2002) 28 Cal.4th 107, 132; see also *People v. Pride* (1992) 3 Cal.4th 195, 229 [“Where a prospective juror gives ... conflicting or equivocal answers concerning his impartiality, the trial court’s assessment of his state of mind is generally binding on the appellate court.”]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 488 [“If there is no inconsistency [in the prospective juror’s answers], the reviewing court will uphold the court’s ruling if substantial evidence supports it.”].)

“Although challenges for cause are constitutionally guaranteed, the right to peremptory challenges is statutory.” (*Black, supra*, 58 Cal.4th at p. 916; Code Civ. Proc.,

§ 231, subd. (a).) In other words, “[p]eremptory challenges are not of constitutional dimension,’ but are merely ‘a means to achieve the end of an impartial jury.’” (*Black, supra*, at pp. 916-917.) Thus, the “[m]ere loss of a peremptory challenge does not automatically constitute a violation of the federal constitutional right to a fair trial and impartial jury.” (*Id.* at p. 917.) In sum “our case law now reflects that an erroneous denial of a challenge for cause to one juror is not reversible error when it deprives a defendant only of a peremptory challenge to another juror.” (*Ibid.*)

In *Black*, our Supreme Court clarified that “[i]f no biased or legally incompetent juror served on [a] defendant’s jury, the judgment against him does not suffer from a federal constitutional infirmity, even if he had to exercise one or more peremptory challenges to excuse prospective jurors whom the court should have excused for cause.” (*Black, supra*, 58 Cal.4th at p. 917.) ““So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean” a constitutional violation occurred.” (*Ibid.*)

G. Analysis

During jury selection, the trial court denied Lucero’s challenges for cause as to Jurors 348, 350, and 344, and as to Juror 348, the trial court also restricted voir dire (specifically, the court ruled that defense counsel could not inquire into the “intimate details” of Juror 348’s relationship with the prosecutor). (See *People v. Debose* (2014) 59 Cal.4th 177, 194 [“The purpose of voir dire is to ‘aid ... the exercise of challenges for cause.’”]; Code Civ. Proc., § 223.) Lucero contends the trial court erred in denying her challenges for cause as to these prospective jurors and in restricting voir dire as to Juror 348, thereby violating her rights to a fair trial and impartial jury under the Sixth Amendment to the federal Constitution, as well as its analog in the state Constitution.

As stated above, after the court denied her challenges for cause to the three prospective jurors (having previously limited the voir dire of one of the three), Lucero used three of her peremptory challenges to remove these jurors, thereby exhausting her

peremptory challenges. Thereafter, Lucero asked the trial court for two extra peremptory challenges, stating it would be fair for the court to grant the request as the court had denied her for-cause challenges. Defense counsel, evidently based on a mistaken understanding of the law, explained that a request for extra peremptory challenges was necessary for purposes of preserving Lucero's right to appeal the court's rulings on her for-cause challenges. Counsel did not indicate that the requested peremptory challenges were required to remove jurors he deemed objectionable or legally incompetent. Nor did counsel subsequently express dissatisfaction, in any way, with the jury that was ultimately seated. Accordingly, the record does not reveal whether counsel was in fact dissatisfied with the jury on account of the presence of one or more objectionable and/or incompetent jurors.

The People contend that Lucero has forfeited her claims regarding the trial court's denial of her challenges for cause. "[A] defendant challenging on appeal the denial of a challenge for cause must fulfill a trio of procedural requirements: (1) the defense must exercise a peremptory challenge to remove the juror in question; (2) the defense must exhaust all available peremptory challenges; and (3) the defense must express dissatisfaction with the jury as finally constituted." (*Weaver, supra*, 26 Cal.4th at pp. 910-911; *People v. Clark* (2016) 63 Cal.4th 522, 565 (*Clark*) [there are no exceptions to the three procedural prerequisites for appealing the denial of a challenge for cause]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 ["To preserve a claim of error in the denial of a challenge for cause, the defense must either exhaust its peremptory challenges and object to the jury as finally constituted or justify the failure to do so"], overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Lucero did not meet these requirements because, although she requested two additional peremptory challenges, she did not express dissatisfaction with the jury as finally constituted. (See *People v. Mills* (2010) 48 Cal.4th 158, 187 [an "*express statement of dissatisfaction*" is required in all cases tried after 1994, when our Supreme Court clarified this rule].)

Accordingly, she forfeited her claims. Indeed, because it is unclear whether counsel *intended to exercise* the extra peremptory challenges he requested, to remove one or more objectionable and/or incompetent jurors, the issue of counsel's ultimate satisfaction or dissatisfaction with the jury remains an open question *on the existing record*.

Even if her claims were not forfeited, Lucero has failed to show prejudice. (*Black, supra*, 58 Cal.4th at p. 920 [“A defendant must show that the error [complained of] affected his [constitutional] right to a fair and impartial jury.”].) Lucero cured any error that occurred when the trial court denied her for-cause challenges to Jurors 344, 350, and 348 (and limited the voir dire of Juror 348), by removing all three jurors with peremptory challenges. (*Id.* at p. 917 [“““So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean a constitutional violation occurred.”””].) Furthermore, although Lucero requested two extra peremptory challenges, she has not shown that an incompetent juror (one who should have been dismissed for cause) actually sat on the jury ultimately selected. (See *Ibid.* [“If no biased or legally incompetent juror served on [a] defendant's jury, the judgment against him does not suffer from a federal constitutional infirmity, *even if he had to exercise one or more peremptory challenges to excuse prospective jurors whom the court should have excused for cause.*”] (Italics added).)

In sum, although Lucero clearly used peremptory challenges to remove jurors she had first challenged for cause *and* she requested two extra peremptory challenges upon exhaustion of her peremptories, she has failed in the end to show the requisite prejudice, i.e., that her constitutional rights to a fair and impartial jury were violated because an incompetent juror served on the jury ultimately selected. (*People v. Yeoman* (2003) 31 Cal.4th 93 [when a defendant uses peremptory challenges to excuse prospective jurors who should have been removed for cause, her right to an impartial jury is affected *only* if her peremptory challenges are exhausted *and* an incompetent juror sits on the jury that decides the case]; *People v. Millwee* (1998) 18 Cal.4th 96, 146 [no constitutional

violation when prospective jurors challenged for cause by defense were nonetheless removed by peremptory challenges and no incompetent juror was left on the jury]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1159 [same]; *Clark, supra*, 63 Cal.4th at p. 565 [same].) In turn, Lucero is not entitled to reversal of the judgment.

Finally, Lucero's contention that counsel was ineffective because he did not express dissatisfaction with the jury as seated or identify one or more incompetent jurors also fails on account of her failure to show the requisite prejudice, i.e., that her constitutional right to a fair and impartial jury was violated because an incompetent juror actually sat on the jury that decided this matter.

II. Admission of Roberts's Hearsay Statements

The prosecution made an in limine motion to admit, under *People v. Riccardi* (2012) 54 Cal.4th 758, 814-825 (*Riccardi*)⁵ and Evidence Code section 1250, Roberts's out-of-court statements to Sergeant Roberts and, separately, to Erick Burkey (Roberts's nephew), to show Roberts's *state of mind* (i.e., a negative view and rejection of Lucero) and, in turn, to prove Lucero's motive to kill him. (*Riccardi, supra*, at p. 815 ["Although motive is normally not an element of any crime that the prosecutor must prove, 'evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable.'"]) The defense opposed the prosecution's motion to admit Roberts's hearsay statements. After hearing argument from both parties, the court found that Roberts's hearsay statements reflecting his state of mind (i.e., a negative view and rejection of Lucero) were relevant, and admissible under *Riccardi* and Evidence Code section 1250, for the limited purpose of proving Lucero's motive for murdering him. (See *Riccardi, supra*, at p. 818 [when defendant was aware of and reacted to the decedent victim's state of mind (and actions in conformity with that state of mind), the

⁵ *Riccardi* was overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192.

decedent victim's state of mind was relevant and admissible to show defendant's motive];⁶ see also Evid. Code, § 1250, subd. (a)(1) [evidence of statement of declarant's then existing state of mind not made inadmissible by hearsay rule if "[t]he evidence is offered to prove the declarant's state of mind ... when it is itself an issue in the action"].⁷)

Lucero now objects to three hearsay statements attributed to Roberts that were admitted at trial pursuant to the court's ruling. The disputed hearsay statements were

⁶ *Riccardi* relied in part on *Commonwealth v. Qualls* (1997) 425 Mass. 163, 167 ["The state-of-mind exception to the hearsay rule calls for admission of evidence of a murder victim's state of mind as proof of the defendant's motive to kill the victim *when and only when there also is evidence that the defendant was aware of that state of mind at the time of the crime and would be likely to respond to it.*" (italics added)] and *State v. Calleia* (2011) 206 N.J. 274, 297 ["when a victim's state-of-mind hearsay statements are relevant to show the [victim's] own conduct, and when such conduct is known or probably known to the defendant, it also can give rise to motive, and the statements become admissible for that purpose"]. *Riccardi* further noted: "We caution, however, that those statements that go no further than to indicate the victim's fear of the defendant, even if known by a defendant, generally cannot be admissible unless they have some relevant effect on the defendant's behavior." (*Riccardi, supra*, 54 Cal.4th at p. 820.) *Riccardi* explained that "[t]he victim's fear may explain the victim's conduct, but standing alone it does not necessarily provide a defendant's motive to kill." (*Id.* at p. 819.) "Generally, it is the rejection that provides a defendant's motive, not the victim's fear." (*Ibid.*) But, *Riccardi* further cautioned: "If a statement ... presents significant danger of prejudice *by describing a defendant's conduct*, a trial court presumably will refuse to admit such evidence of the victim's state of mind." (*Id.* at p. 825, italics added.)

⁷ Evidence Code section 1250 provides an exception to the hearsay rule for statements of the declarant's *then* existing mental or physical state. Under section 1250, a statement showing the declarant's state of mind at the time the statement was made is admissible when the then existing state of mind is itself an issue in the case. (See Comment to Evid. Code, § 1250.) However, Evidence Code section 1250 applies only to direct expressions or declarations of a person's state of mind—e.g., "I am afraid of [defendant]"—that are offered to prove the truth of the matters asserted. (*Riccardi, supra*, 54 Cal.4th at p. 822.) Indirect declarations of a person's state of mind—e.g., "[defendant] kidnapped me at gunpoint"—are not hearsay to the extent they are admitted to circumstantially prove the *declarant's* state of mind or conduct, and not to prove the truth of matters asserted regarding *defendant's* conduct. (*Id.* at p. 823.)

admitted during the testimony of Sergeant Roberts (supervisor of Explorer and PACT programs at Sonora Police Department), Erick Burkey (nephew of Rick Roberts), and Donna Burkey (mother of Rick Roberts), respectively.

Sergeant Roberts testified to a hearsay statement made by Rick Roberts: “Mr. Roberts told me that there was a girl that he met in – I think Modesto Panda Express that he felt was stalking him. On several occasions, he saw her parked up at the old E.D.D. building, which is now the Job Center or Mother Lode Internet, so he, you know, expressed that to me.” Sergeant Roberts added: “If he was feeling threatened like he had to tell somebody, then I felt like he needed to take another step and make a report, but he refused.”

Erick Burkey testified about two incidents that he personally witnessed and found to be strange. First, in 2010, Erick was in Roberts’s shop (Roberts was not there) when Lucero, dressed in western clothing, came into the shop looking for Roberts; Erick said, “it was weird to see” Lucero in Sonora. Next, there was an incident that occurred later but also 2010, at a demolition derby in which Roberts was competing. Roberts and Erick were in “the pits” at midday, preparing for the start of the competition later that evening, when Lucero appeared at the “fence line.” She just stood there for “three or four” hours, watching them. Erick found her behavior “very odd.” Although Erick witnessed the foregoing incidents, he also testified to a hearsay statement by Roberts at the demolition derby: “[Roberts] did say that ‘She’s – she’s following me and being a – a nuisance.’” Erick also testified that, at another point in time, Roberts told him that Lucero had asked Roberts to help her move to Twain Harte but Roberts had refused.

Donna Burkey, Roberts’s mother, testified to a hearsay statement made by Roberts in 2010, as well. Donna said: “Well, I guess [Lucero] wanted to move up to Sonora, and he told me that she asked him to help move. And he said, ‘I’m sorry, I’m not going to help you move, and don’t move up there on my account because I’m married and I have a child,’ so he kind of backed off going to Panda there.” Donna further testified:

“[T]hrough [Roberts] and through Erick, too, both, I guess there was a possibility that she kind of stalked him and watched him across the street, which made Erick and Ricky uncomfortable, and I think they notified [Sergeant Roberts] a few times.” In addition to her testimony about Roberts’s hearsay statements, Donna also described an incident she had personally witnessed. For example, Donna testified that in the summer of 2013, Lucero showed up at Christian Heights Church dressed like a “rodeo queen,” when Donna and Roberts were present. Donna said that Roberts looked shocked and disturbed, such that she thought he was having a heart attack.

Lucero argues the hearsay statements attributed to Roberts by Sergeant Roberts, Erick Burkey, and Donna Burkey were inadmissible under both Evidence Code section 1250 and *Riccardi*. Preliminarily, she contends that the statements at issue only described Lucero’s actions and did not reflect Roberts’s state of mind at all. She also argues that, to the extent these statements reflected Roberts’s state of mind, namely rejection of Lucero, there was no independent evidence suggesting Lucero was aware of, and, on an ongoing basis was reacting to, this state of mind. Finally, she argues that Robert’s rejection of Lucero was not, in any event, a disputed issue in the case.

Regardless of the merits of Lucero’s contention that Roberts’s hearsay statements as recounted by Sergeant Roberts, Erick Burkey, and Donna Burkey were improperly admitted under *Riccardi* and Evidence Code section 1250, we conclude admission of these statements was harmless under any standard of prejudice. (Cf. *Riccardi, supra*, 54 Cal.4th at p. 825 [applying *Watson*⁸ standard to assess prejudice arising from admission of decedent victim’s hearsay statements regarding decedent victim’s state of mind and *defendant’s* conduct, offered to prove *defendant’s* motive for murder].) In turn, Lucero’s claim that admission of these statements requires reversal of her conviction for Roberts’s murder and of the judgment below, fails.

⁸ *People v. Watson* (1956) 46 Cal.2d 818, 836-837 [state law errors subject to reasonable probability standard of prejudice].

Here, the prosecution presented an exceptionally compelling case against Lucero. Through the testimony of Teddi Roberts, Erick Burkey, Donna Burkey, Susan Collie, Susan Hume, and Lucero herself, the prosecution showed that Lucero had a consuming infatuation with Roberts, who ultimately ended their romantic and sexual relationship. Next, there was strong evidence of planning activity by Lucero (she purchased the gun only a month before the murder, wrote incriminating goodbye letters to her next of kin the day after she picked up the gun from the Bass Pro Shop, and insisted on removing the gun from the gun locker where Joe Yniguez had stored it). In addition, physical evidence, described as conclusive by the People's ballistics expert, showed that Lucero's gun was used to kill Roberts. Lucero also confessed to killing Roberts (after engaging in obfuscation and deception regarding the whereabouts of her gun). Finally, as to the challenged hearsay statements in which Roberts complained that Lucero was stalking him, the prejudicial effect of these statements was undercut by ample, properly admitted evidence showing that Lucero had appeared, at various times, in places that Roberts frequented (e.g., his church and destruction derby competitions) in a way that was "odd" and "weird" and that Roberts himself found unsettling (as evinced by his body language and conduct during those encounters). We will address all of this evidence in more detail.

Regarding Lucero's infatuation with Roberts, the prosecution adduced evidence of a photo of Roberts and his son, on the back of which Lucero had written, "My husband and his son, John." The prosecution also presented evidence of a handcrafted wedding announcement or invitation that Lucero had created regarding her ostensible wedding to Roberts. Susan Hume testified that Lucero wore a ring on the ring finger of her left hand that she said Roberts had given her. Hume further testified that Lucero had tattooed an image of Roberts's U2 derby car on her hip, would describe Roberts as the "perfect" man, and said that "God had put them together."

Witnesses also described Lucero's disconcerting behavior in the church that Roberts had long attended with his family. Roberts's mother Donna testified that when Roberts saw Lucero in the church for the first time, he looked like he was having a heart attack. Susan Hume noted that while in church, Lucero would be "kind of looking at [Roberts] a lot." "Mostly every Sunday," she would be "[l]ooking at him admiringly." Roberts's wife, Teddi, testified that Lucero had also behaved strangely with her. Teddi explained that Lucero stared at her and her son Jhonathen in a supermarket parking lot and then followed them as they drove home. In addition, Erick described a situation he found weird. He testified that Lucero had appeared at a demolition derby in which Roberts was competing and stared at Roberts and Erick for hours in an "odd" way. Lucero also moved from Modesto to Sonora, where Roberts lived, eventually changing jobs from the Modesto Panda Express to the Sonora McDonald's as well. Although Lucero clearly had a massive infatuation with Roberts, a check of Roberts's cell phone as well as his phone records for the past year showed that over the course of the year before he was murdered, Roberts had not communicated with Lucero via texts or calls at all.

As for the gun used in the murder, Lucero bought the H&K pistol on January 6, 2014, and picked it up on January 17, 2014. The next day, January 18, 2014, Lucero wrote goodbye letters to her daughter, mother, and Yvonne Yniguez. In the letters, she referred to a man who had taken over her life and said she was "blinded by [her] love" for him. She apologized for the "hurt and pain" her actions would cause. Although Joe Yniguez wanted Lucero to keep her pistol in a gun safe at the house (only he and Yvonne knew the combination to the safe as it belonged to them), at the end of January, Lucero argued with Joe about taking her pistol out of the safe; she got her way and kept it on her dresser from that point on.

Through forensic testing and comparison of the shell casing found at the murder scene and the shell casings in the "test fire" envelope found in Lucero's dresser, her gun ultimately was conclusively linked to Roberts's murder. For her part, Lucero did not turn

her gun in to the police for testing, even though she repeatedly told the police she would do so. When the police questioned her about the whereabouts of her gun, she lied and said she had given it to her son in Los Angeles. Indeed, she never produced her gun or provided a reasonable explanation for where it went (it was never found).

Lucero also lied about her home address as well as her connection to Roberts, during her initial interactions with the police. Nonetheless, when confronted during her subsequent interrogation, with the evidence amassed by the police, Lucero confessed that she was the one who shot and killed Roberts. Upon realizing she was under arrest, she falsely blamed Christopher Tinkham for the shooting (Tinkham's employer provided an alibi). At trial, Lucero changed her story yet again and falsely insinuated that Joe Yniguez was the shooter (Yvonne Yniguez confirmed that Joe Yniguez was at home at the time of the shooting). Finally, Yvonne Yniguez testified that when she told Lucero that Roberts had been murdered, Lucero had no reaction at all.

Given the record in this matter, we conclude the admission into evidence of the disputed hearsay statements attributed to Roberts was harmless under any standard of prejudice.⁹

⁹ In addition to arguing that the disputed hearsay statements were inadmissible under Evidence Code section 1250 and *Riccardi*, Lucero further argues that admission of these statements violated her rights to due process and confrontation. In light of the perfunctory nature of these claims, which Lucero has entirely failed to develop, we reject them as improperly raised. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) In any event, admission of the disputed statements did not violate due process by undermining the fairness of the trial. Nor did the trial court's admission of these statements violate the confrontation clause as, under the court's ruling, the statements were offered to indirectly show the *decedent's* state of mind, not for the truth of the matters asserted regarding defendant's conduct. (See *People v. Valadez* (2013) 220 Cal.App.4th 16, 30 [confrontation clause implicated only when out-of-court statements are offered for their truth].) Lucero has also failed to show prejudice.

III. Ineffective Assistance of Counsel

Lucero argues trial counsel was ineffective for failing to renew a pretrial request to admit evidence showing that Lucero was aware that Roberts, at the time of his death, was having an extramarital affair with a female volunteer in the Sonora Police Department's Explorer program (the court had reserved its ruling when the request was initially made). Lucero argues this evidence was significant because it showed Roberts was sharing confidences with Lucero up until his death; in other words, he was still close to Lucero and had not completely cut her off. We reject Lucero's claim that counsel was ineffective in this regard.

A. Background

The prosecution moved in limine to exclude the testimony of a female police volunteer in the Explorer program, who was on the defense's witness list (Roberts was also a police department volunteer). After Roberts's murder, the female volunteer informed law enforcement that she and Roberts were having an affair at the time that he was killed. The prosecution argued that evidence of this affair was both irrelevant and inadmissible under Evidence Code section 352. Defense counsel argued, to the contrary, that this evidence was relevant:

“[DEFENSE COUNSEL]: Your Honor, [this evidence] is extremely relevant. [¶] In this particular case, during Ms. Lucero's recorded statement, the six-and-a-half hour recorded statement, she makes reference to the fact that Mr. Roberts was reprimanded in some way for this relationship. We submit that the only way she could know that is if Mr. Roberts told her. It certainly wasn't in the newspaper. There is no other way for her to find out. That shows that during that time period, she was talking to Roberts and he was confiding things to her that you wouldn't confide normally to anybody, so we think that is very relevant. [¶] ... [¶]

“And the relevance—I don't know how I can make it any clearer. Miss Lucero knows that he got reprimanded. There is no way for her know that unless he told her. If there is any other theory for how she knew, I'd love to hear it. But she knows about it. That shows that all this bit about

she's stalking him isn't true because he's engaging in what could be pillow talk about this reprimand."

The court reserved its ruling on this issue until it had reviewed Lucero's recorded police interrogation and heard her testimony. Subsequently, during trial, the prosecution played the videotape of Lucero's police interrogation for the jury. During the interrogation, Lucero said that Roberts "was with ... a cadet or something" and "had some kinda paperwork put against him at work" for "harassing" her. Lucero added, "I couldn't tell you when this was I have no idea ... cause I was just like, I was in shock as to why would he tell me this?"

B. Analysis

Lucero argues that, after the prosecution played her recorded police interrogation for the jury and she testified at trial, counsel should have renewed his request to introduce evidence of the affair between Roberts and the police volunteer and that counsel's failure to do so constitutes ineffective assistance. Specifically, she contends: "[E]vidence that Roberts was having an affair with this police volunteer up to the time of his death ... corroborated [Lucero's] statement to the [interrogating officer] that Roberts had told her about this affair. [Taken together, this] evidence constituted circumstantial evidence that [Lucero] and Roberts were on friendly (and perhaps even more intimate) terms up to the time of his death, which rebuts Roberts'[s] out-of-court statements that she was stalking and following Roberts and rebuts the state's theory that she was motivated to kill because of Roberts'[s] rejection." Lucero concludes: "By failing to follow through with his initial request and by failing to renew his motion, defense counsel was ineffective."

To establish constitutionally inadequate representation, a defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for

counsel's failings, the result would have been more favorable to the defendant.¹⁰ (*People v. Haskett* (1990) 52 Cal.3d 210, 248; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218; also see *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-696.) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1126.) When reviewing an ineffective assistance of counsel claim, "there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Although Lucero complains that counsel was deficient in not renewing his request to admit evidence of the affair between Roberts and the police volunteer, counsel may have made a reasonable tactical decision to withhold this evidence. For one thing, counsel could have decided to withhold this evidence on grounds that it would support a reasonable inference that, by moving on to an affair with another woman, Roberts had angered Lucero, thereby highlighting the prosecution's theory that Lucero killed Roberts because he had rejected her. Alternatively, counsel may have been concerned that the prosecution would adduce evidence contradicting Lucero's statement that Roberts was reprimanded by the police department in connection with his affair with the female volunteer, thereby undermining Lucero's credibility. (See, e.g., *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [counsel's tactical decisions lead to reversal on grounds of ineffective assistance "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].) In short, on the limited record before us, we cannot say that counsel was deficient in failing to renew his pretrial request to admit evidence of the affair between Roberts and the female police volunteer. Nor has Lucero persuaded us that she was prejudiced by counsel's tactical choices in this regard.

¹⁰ A reasonable probability means a "probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

IV. Cumulative Error

Lucero argues that reversal of the judgment is required because of the cumulative effect of errors by the trial court and ineffective assistance by counsel. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 [“[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.”].) We are not persuaded by Lucero’s claim of cumulative error. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 [the success of a claim based on cumulative errors turns on whether “it is reasonably probable the jury would have reached a result more favorable to [the] defendant in their absence”], overruled on other grounds by *People v. Whitmer* (2014) 59 Cal.4th 733, 761-762.)

V. Firearm Enhancement (§ 12022.53, subd. (d))

Senate Bill No. 620, signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

“The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The new legislation thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the trial court imposed a firearm enhancement of 25 years to life under section 12022.53, subdivision (d). Senate Bill No. 620’s amendment to section 12022.53 is retroactively applicable to this case under *In re Estrada* (1965) 63 Cal.2d 740, 745, because it potentially mitigates punishment. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [applying Senate Bill No. 620 to case not yet final when law became effective]; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].)

In imposing the then-mandatory consecutive sentence of 25 years to life for the firearm enhancement in this matter, the trial court did not say anything indicating that,

had it possessed the discretion to strike the firearm enhancement, it would nonetheless have imposed it. Accordingly, we will remand for resentencing as to the firearm enhancement. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [remanding for resentencing where the record “[does] not clearly indicate that [the trial court] would have imposed the same sentence had [it] been aware of the full scope of [its] discretion”].)

DISPOSITION

The sentence is vacated and the case remanded to the trial court for resentencing in light of section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 1). The judgment is otherwise affirmed.

SMITH, J.

WE CONCUR:

HILL, P.J.

POOCHIGIAN, J.